UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FLOYD L. MORROW and MARLENE MORROW, as taxpayers of the City of San Diego, State of California, and on behalf of those similarly situated,

Plaintiff,

vs.

CITY OF SAN DIEGO, a charter city; MANDEL E. HIMELSTEIN, an individual; and DOES 1-100,

Defendants.

CASE NO. 11-cv-1497 - IEG (WVG)

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

[Doc. No. 9]

Presently before the Court is Defendant City of San Diego ("the City")'s motion to dismiss Plaintiff Floyd L. Morrow and Marlene Morrow ("Plaintiffs")'s second amended complaint. [Doc. No. 9.] For the following reasons, the Court **GRANTS** Defendant City of San Diego's motion to dismiss.

BACKGROUND

Plaintiffs are the owners of a duplex commonly known as 2804 and 2806 46th Street, San Diego, CA 92105, Assessor's Parcel Number 476-392-06 ("APN-06"). [Doc. No. 7, SAC ¶ 11.] Since 2006, Plaintiffs have resided in one of the duplex units and have rented the other unit out to tenants. [Id.] Plaintiffs also own property to the north of APN-06, known as Assessor's Parcel Number 476-392-11 ("APN-11"). [Id. ¶ 12.]

On June 3, 2010, the City issued a Civil Penalty Notice and Order ("the June 3, 2010

Notice") with respect to APN-06, and, on June 4, 2010, the City issued a Civil Penalty Notice and Order ("the June 4, 2010 Notice") with respect to APN-11. [SAC ¶¶ 25-26; Doc. No. 9-2, Request for Judicial Notice ("RJN"), Exs. D, E.][1] The notices stated that APN-06 and APN-11 were in violation of various sections of the San Diego Municipal Code and that Plaintiffs were subject to civil penalties for the violations. [Id.] The notices ordered Plaintiffs to correct the violations by July 5, 2010 and July 6, 2010, respectively, and stated that failure to comply may result in a civil penalty hearing and the assessment of civil penalties against them. [Id.] Plaintiffs allege that due to difficulties with the mail, they did not receive the notices until weeks after they were issued and with only a few days left to comply. [SAC ¶¶ 25-27.]

A civil penalty hearing against Plaintiffs with respect to these violations was commenced on October 14, 2010, and continued on October 21, 2010, November 15, 2010, and November 30, 2010. [SAC ¶ 31; RJN, Ex. A ("Admin. Order").] Plaintiffs were present at all the hearings and presented evidence on their behalf including various documents and witness testimony. [Id.] Plaintiffs allege that after the hearings, on December 23, 2010, the City provided an additional list of violations ("Remaining Violations List"). [SAC ¶ 32.] Plaintiffs allege that they were able to respond to the Remaining Violations List, but that they were not able to cross-examine the City about the demands and violations contained in the list. [Id. ¶ 33.]

On February 15, 2011, the administrative hearing officer, Mandel E. Himelstein, issued an administrative enforcement order ("the Administrative Order"). [Id. ¶ 34; Admin. Order.] The Administrative Order found that Plaintiffs had violated the sections of the San Diego Municipal Code listed in the June 3, 2010 Notice and the June 4, 2010 Notice and Plaintiffs had not complied with the notices. [Admin. Order, Findings of Fact ¶¶ 2-3.] The Administrative Order ordered Plaintiffs to pay (1) $2,250 in civil penalties with a stay of $9,000 pending compliance with the order for the violations related to APN-06; (2) $6,750 in civil penalties with a stay of $15,750

[1] The City requests that the Court take judicial notice of the June 3, 2010 Notice, the June 4, 2010 Notice, and the February 15, 2011 Administrative Enforcement Order. [Doc. No. 9-2, RJN.] Plaintiffs object to the Court taking judicial notice of these documents. [Doc. No. 13-2.] Pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of these documents because they are matters of public record and are part of the administrative record. See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001); Mack v. South Bay Beer Distribs., 798 F.2d 1279, 1282 (9th Cir. 1986). Accordingly, the Court **GRANTS** the City's requests and **OVERRULES** Plaintiffs' objections.

pending compliance with the order for the violations related to APN-11; and (3) $2,303.32 in administrative costs. [Id., Order ¶¶ 1-2.] Plaintiffs allege that the City subsequently invoiced them in the amount of (1) $2,303.32 due March 30, 2011; (2) $2,250 due April 15, 2011; and (3) $6,750 due May 1, 2011. [SAC ¶ 35.]

On March 28, 2011, Plaintiffs filed a complaint in state court against Defendants City of San Diego and Mandel E. Himelstein, the hearing officer. [Doc. No. 1-1, Compl.] On July 1, 2011, the action was removed by Defendants to this Court on the basis of federal question jurisdiction and supplemental jurisdiction. [Doc. No. 1, Notice of Removal.] On July 27, 2011 Plaintiffs filed their second amended complaint ("SAC") against Defendants alleging seven causes of action: (1) waste of public funds in violation of California Code of Civil Procedure § 526a; (2) violations of their constitutional rights pursuant to 42 U.S.C. § 1983; (3) inverse condemnation; (4) invalidation of proceedings pursuant to California Code of Civil Procedure § 860; (5) writ of mandate pursuant to California Code of Civil Procedure § 1085; (6) writ of prohibition pursuant to California Code of Civil Procedure § 1102; and (7) writ of administrative mandamus pursuant California Code of Civil Procedure § 1094.5. [Doc. No. 7, SAC.] On October 7, 2011, the Court dismissed Defendant Mandel E. Himelstein from the action, leaving the City as the only Defendant. [Doc. No. 19.] By the present motion, the City seeks to dismiss Plaintiffs' first through sixth causes of action in the SAC.

DISCUSSION

I. Legal Standards for a Motion to Dismiss

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint. FED. R. CIV. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather, it must plead "enough facts to state

a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556).

However, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)) (alteration in original). A court need not accept "legal conclusions" as true. Iqbal, 129 S. Ct. at 1949. In spite of the deference the court is bound to pay to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts that [he or she] has not alleged or that defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557).

II. Plaintiffs' Constitutional Claims under § 1983

"To establish a prima facie case under § 1983, [a plaintiff] must establish that: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct violated a right secured by the Constitution and laws of the United States." Humphries v. County of Los Angeles, 554 F.3d 1170, 1184 (9th Cir. 2009). Plaintiffs allege that the City's conduct violated their due process rights under the Fourteenth Amendment, their equal protection rights under the Fourteenth Amendment, and their right to be free from excessive fines under the Eighth Amendment. [SAC ¶¶ 73-74.]

A. Procedural Due Process

Plaintiffs allege that the City violated their due process rights by imposing civil penalties and fines on them before providing notice and a meaningful opportunity to be heard or a meaningful opportunity cure any of the purported violations. [SAC ¶ 73.] In order to state a claim for violation of procedural due process, Plaintiffs must allege "(1) a deprivation of a

constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." Kildare v. Saenz, 325 F.3d 1078, 1085 (9th Cir. 2003). Ordinarily, due process of law requires only notice and an opportunity for some kind of hearing prior to the deprivation of a significant property interest. Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1405 (9th Cir. 1989).

The SAC alleges that Plaintiffs were provided with both notice and a hearing prior to the imposition of the civil penalties. Plaintiffs allege that they were provided with notice of their violations as early as June 29, 2010. [SAC ¶ 29.] Plaintiffs also allege that civil penalty hearings occurred on October 14, 2010, October 21, 2010, November 15, 2010, and November 30, 2010, and the hearing officer issued a written order imposing the civil penalties on February 15, 2011. [SAC ¶¶ 31, 34-35; see also Admin. Order.] In addition, the Administrative Order states that Plaintiffs were present for all the hearings and submitted evidence on their behalf including documents and oral witness testimony. [Admin. Order, Statement of Case.]

Plaintiffs argue that the notices the City provided were defective. [Pl.'s Opp'n at 15.] The notices were issued on June 3, 2010 and June 4, 2010, respectively. [RJN, Exs. D, E.] Plaintiffs allege that due to issues with the mail, they did not actually receive these notices until weeks later. [Id.] However, Plaintiffs allege that they did receive the notices days before the July 5th and 6th deadlines for compliance and that Plaintiff Mr. Morrow wrote a letter regarding the notices on June 29, 2010. [Id. ¶¶ 27, 29.] Therefore, Plaintiffs had notice of the violations at the latest by June 29, 2010. In addition, Plaintiffs correctly note in their opposition that the hearing officer acknowledged that there were issues with the notices and adjusted the penalty award accordingly to reflect that Plaintiffs likely did not receive notice of the violations until August 31, 2010. [Admin. Order, Findings of Fact ¶ 5.] The Court notes that this finding by the administrative officer actually appears to be quite generous to Plaintiffs given that they allege that they had notice as early as June 29, 2010, which is more than two months prior to August 31, 2010. Therefore, any defects that might have occurred with the original notices were remedied by the hearing officer, and Plaintiffs did not suffer a deprivation of property due to the possible defects.

Plaintiffs also argue that the hearing was not meaningful. [Pl.'s Opp'n at 15.] Plaintiffs

allege that after the hearings had concluded, on December 23, 2010, the City provided a Remaining Violations List, which included new violations and demands. [SAC ¶ 32.] Plaintiffs further allege that although they were able to respond to the Remaining Violations List, they they were not able to conduct cross-examination with respect to the demands and violations in the list. [Id. ¶ 33.] Plaintiffs allege that the Administrative Order mimics the Remaining Violations List. [Id. ¶ 34.] However, the Administrative Order states that the decision was based on the June 3, 2010 Notice and June 4, 2010 Notice and that the civil penalties were being assessed for the time period of July 5, 2010 to October 14, 2010. [Admin. Order, Findings of Fact ¶¶ 3-6, Determination of Issues ¶¶ 3-5.] Plaintiffs were provided with four hearings beginning on October 14, 2010 to address the violations in the two notices for that time period, and Plaintiffs were present at the hearings and were able to present evidence on their behalf. Therefore, based on the allegations in the complaint, Plaintiffs were provided with notice and an adequate hearing prior to suffering any deprivation by the City. Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' due process claim.

B. Equal Protection Clause

Plaintiffs allege that the City targeted low to moderate income households for a proactive code enforcement program in violation of the Equal Protection Clause. [SAC ¶¶ 74.] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." Lee, 250 F.3d at 686 (citations omitted). "To state a claim under 42 U.S.C. § 1983 for a violation of [equal protection] a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." Id.

Plaintiffs fail to properly plead a cause of action for violation of the equal protection clause because they have not alleged that they are members of a protected class. Plaintiffs argue that the poor are a suspect class, and discrimination against them is subject to strict scrutiny. [Pl.'s Opp'n at 13-14.] However, the Supreme Court has held that the poor are not a protected class, and wealth discrimination alone does not provide an adequate basis for invoking heightened scrutiny.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-42 (1985) (listing the constitutionally recognized protected classes).

An equal protection claim can also be alleged under the class-of-one theory. Engquist v. Or. Dep't of Agric., 478 F.3d 985, 992 (2007) (citing Willowbrook v. Olech, 528 U.S. 562 (2000)). A plaintiff properly pleads a class-of-one equal protection claim, where the plaintiff "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Willowbrook, 528 U.S. at 564. Plaintiffs do not allege that they were treated differently than similarly situated individuals. To the contrary, the SAC alleges that they were treated similarly to other low to moderate income households. [SAC ¶¶ 74.] Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' equal protection claim.

C. Excessive Fines Clause

Plaintiffs allege that the civil penalties assessed against them in the Administrative Order were excessive in violation of the Eighth Amendment. [SAC ¶¶ 73.] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. An excessive fines analysis involves two steps: (1) whether the Excessive Fines Clause applies, and (2) if, so, whether the fine is "excessive." Engquist v. Oregon Dept. of Agriculture, 478 F.3d 985, 1006 (9th Cir. 2007) (citing United States v. Bajakajian, 524 U.S. 321, 334 (1998)).

The Excessive Fines Clause "applies only to government action that constitutes 'punishment for some offense.'" Engquist, 478 F.3d at 1006. California courts have held that civil penalties "are punitive in character." People v. Union Pacific Railroad Co., 141 Cal. App. 4th 1228, 1258 (2006). Therefore, the Excessive Fines Clause applies to the civil penalties that were assessed against Plaintiffs in the Administrative Order.

A fine is excessive "if it is grossly disproportional to the gravity of a defendant's offense." Bajakajian, 524 U.S. at 334. Although there is "no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum

penalty available, and the harm caused by the offense." Horne v. United States Dep't of Agric., 2011 U.S. App. LEXIS 15284, at *35 (9th Cir., Jul. 25, 2011).

The administrative order states that civil penalties of $250 per day were assessed against Plaintiffs with respect to APN-6 for violations of San Diego County Municipal Code sections 121.0302, 129.0702, 142.1110, 142.0560(d)(1), 142.0510(e), 142.0560(h)(1), 131.0431(b), 129.0702(a)(2),[2] and 142.0510(b) for a total penalty of $11,250 with a stay of $9,000 pending compliance with the order. [Admin. Order, Findings of Fact ¶ 3.] Civil penalties of $500 per day were also assessed against Plaintiffs with respect to APN-11 for violations of San Diego County Municipal Code sections 121.0302, 129.020, 129.0111, 129.0302, 129.0314, 129.0402(a), 129.0405(e), 129.0602, 143.0110(a)(1)(2), 143.0141(i), and 142.0142 for a total penalty of $22,500 with a stay of $15,750 pending compliance with the order. [Id., Findings of Fact ¶ 4.]

The Supreme Court has noted that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." Bajakajian, 524 U.S. at 336. Accordingly, the imposition of a fine that is less than what legislature has authorized "weighs heavily against finding the fine grossly disproportional." Horne, 2011 U.S. App. LEXIS 15284, at *36; see also United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1309 (11th Cir. 1999) (stating that if the fine "is within the range of fines prescribed by Congress, a strong presumption arises that the forfeiture is constitutional.").

The San Diego Municipal Code states that a violation of any of the provisions of the code shall constitute a misdemeanor and shall be punishable by a fine of not more than $1,000. S.D., CAL., MUNI. CODE § 12.0201. The code further states that each person shall be charged with a separate offense for each day a violation is committed or continued. Id. The code's $1,000 fine is within the range proscribed by the California Penal Code, which provides that misdemeanors are punishable by a fine not exceeding $1,000. CAL. PEN. CODE § 19. The Administrative Order shows that the penalties of $500 per day and $250 per day were within the range proscribed by the

[2] The Court notes that the Administrative Order lists this violation as "129.0602(a)(2) (public improvement permit)." However, this appears to be a typographical error because the violation listed in the June 3, 2010 notice was for section 129.0702(a)(2) [RJN, Ex. D], and section 129.0702 governs public improvement permits. See S.D., CAL., MUNI. CODE § 129.0702(a).

legislature for the multiple violations and well below the maximum penalty. In addition, a large portion of the penalties were stayed pending compliance with the order. Further, the number of code sections that Plaintiffs were found to be in violation of shows the severity of their conduct. In light of these factors, even taking the allegations in the complaint as true, the civil penalties were not grossly disproportionate as a matter of law and were not "excessive" in violation of the Eighth Amendment. Accordingly, the Court **DISMISSES WITH PREJUDICE** Plaintiffs' excessive fines claim.

III. Inverse Condemnation

Plaintiffs allege that the City has repeatedly prevented Plaintiffs from engaging in the permitting process and prohibited Plaintiffs from making use of their property rendering both APN-06 and APN-11 valueless. [SAC ¶¶ 78-80.] Plaintiffs seek compensation for the alleged takings. [Id. ¶¶ 82-83.] Although Plaintiffs' SAC does not specify whether its inverse condemnation claim is brought under federal or state law, Plaintiffs argue in their opposition that the SAC alleges both a federal takings claim under the Fifth Amendment and a state law takings claim. [Pl.'s Opp'n at 16-18.] The City argues that Plaintiffs' takings claims are not ripe. [Def.'s Mot. at 14-15.]

The Fifth Amendment guarantees that private property shall not "be taken for public use without just compensation." Agins v. Tiburon, 447 U.S. 255, 260 (1980). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005). However, the Supreme Court has also recognized that "the government regulation of private property may, in some instances, be so onerous" that it may be compensable under the Fifth Amendment. Id.

"A federal takings claim is not ripe until a litigant has '[sought] compensation through the procedures the State has provided for doing so.'" Spoklie v. Montana, 411 F.3d 1051, 1057 (9th Cir. 2005) (quoting Williamson Cnty Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985)). This is because "only takings without 'just compensation' violate [the Fifth] Amendment; 'if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the

procedure and been denied just compensation.'" Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 (1997).

California has adequate procedures to compensate property owners for unconstitutional takings. See, e.g., CAL. CONST., art. I, § 19; Klopping v. City of Whittier, 8 Cal. 3d 39 (1972); Kavanau v. Santa Monica Rent Control Bd., 66 Cal. 4th 761 (1997); see also Equity Lifestyle Props., Inc. v. Cnty of San Luis Obispo, 548 F.3d 1184, 1192 (9th Cir. 2007) ("California's creation and implementation of the Kavanau adjustment process provides 'an adequate procedure for seeking just compensation.'"); S. Pac. Transp. Co. v. Los Angeles, 922 F.2d 498, 505 (9th Cir. 1990) (stating that Klopping provides an adequate procedure for obtaining just compensation). However, Plaintiffs do not allege that they have sought compensation in state court for the alleged takings and been denied. To the contrary, Plaintiffs argue that they are bringing an inverse condemnation claim under state law pursuant to Klopping as part of this lawsuit. [Pl.'s Opp'n at 17-18.] Accordingly, Plaintiffs' federal takings claim is not ripe, and the Court **DISMISSES WITHOUT PREJUDICE** the claim for lack of subject matter jurisdiction. See Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 661 (9th Cir. 2003).

IV. Plaintiffs' State Law Claims

Plaintiffs' remaining claims arise under California law: waste of public funds in violation of California Code of Civil Procedure § 526a; inverse condemnation under state law; invalidation of proceedings pursuant to California Code of Civil Procedure § 860; writ of mandate pursuant to California Code of Civil Procedure § 1085; writ of prohibition pursuant to California Code of Civil Procedure § 1102; and writ of administrative mandamus pursuant California Code of Civil Procedure § 1094.5. [SAC ¶¶ 66-70, 77-109.] Where a district court has dismissed all claims over which it has original jurisdiction, it may decline to exercise supplemental jurisdiction over remaining state law claims. 28 U.S.C. § 1367(c)(3); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) ("[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right."). When deciding whether to exercise supplemental jurisdiction, the Court considers judicial economy, convenience and fairness to litigants, and comity with state courts. Gibbs, 383 U.S. at 726. Where all federal claims have been dismissed, the balance of factors usually tips in favor of

declining to exercise jurisdiction over the remaining state law claims and dismissing them without prejudice. Gini v. Las Vegas Metro. Police Dep't., 40 F.3d 1041, 1046 (9th Cir. 1994). Having dismissed Plaintiffs' federal claims and finding no diversity jurisdiction in Plaintiffs' complaint, the Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims. Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' state law claims.

CONCLUSION

For the reasons above, the Court **GRANTS** the City of San Diego's motion to dismiss and **DISMISSES WITH PREJUDICE** Plaintiffs' claim for violation of the excessive fines clause and **DISMISSES WITHOUT PREJUDICE** Plaintiffs' remaining claims. Plaintiffs may file an amended complaint within (20) calendar days from the date of this Order.

IT IS SO ORDERED.

DATED: October 18, 2011

IRMA E. GONZALEZ, Chief Judge
United States District Court